No. 86-745

In the Supreme Court of the United States

OCTOBER TERM, 1986

VERMONT DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, PETITIONER

v.

OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statutory foster-care procedures adopted by the State of Vermont comport with the requirements of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 *et seq.*, and thus entitle the State to certain federal foster-care funds for fiscal year 1981.

2. Whether the court of appeals erred in failing to remand to the district court certain claims raised by petitioner that were not resolved by the district court in reaching its decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) is reported at 798 F.2d 57. The opinion of the district court (Pet. App. 20a-32a) is unreported. The opinion of the Grant Appeals Board (Pet. App. 33a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1986. The petition for a writ of certiorari was filed on November 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Adoption Assistance and Child Welfare Act of 1980 (the Act), Pub. L. No. 96-272, 94 Stat. 500 *et seq.*, "[i]n response to demonstrated inadequacies in our nation's system of foster care" (Pet. App. 4a-5a). The Act provided the states with financial incen-

tives to establish a more "active and systematic monitoring of children in the foster care system" (Pet. App. 5a) in order to prevent children from becoming "lost" or "stranded" through bureaucratic inattention. Congress provided these incentives by amending Title IV-B of the Social Security Act (42 U.S.C. (& Supp. II) 620-628), which provides funds to the states for the improvement of child welfare services, and by creating a new Title IV-E program (42 U.S.C. (& Supp. II) 670-676) to reimburse states for foster care maintenance and adoption assistance.

In amending Title IV-B, Congress authorized annual appropriations of $266 million. Of this amount, each state was to receive a proportionate share of an initial $141 million appropriation. In order to qualify for any funds appropriated in excess of $141 million (so-called "excess funds"), a state was obliged to certify, inter alia, that it "has implemented and is operating to the satisfaction of the Secretary * * * a case review system * * * for each child receiving foster care under the supervision of the State." 42 U.S.C. 627(a)(2)(B); see Pet. App. 5a. As relevant here, the central feature of this "case review system" requires participating states to provide so-called "dispositional hearings" for "each child in foster care under the supervision of the State" (42 U.S.C. 675(5)(C)). The objective of these judicial or quasi-judicial hearings is to "determine the future status of the child" and thus to prompt a final decision concerning the foster child's long-term placement (*ibid.*).[1]

[1] In pertinent part, the statute requires that each state adopt procedures for assuring that (42 U.S.C. 675(5)(C)):

> with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen

On December 31, 1980, the Secretary of Health and Human Services published interim regulations governing state compliance with the statutory scheme described above. 45 Fed. Reg. 86817. These interim regulations were later withdrawn (46 Fed. Reg. 14895 (1981)) and final regulations were not published until May 23, 1983 (48 Fed. Reg. 23118). To fill this regulatory gap, HHS advised the states that they could submit a certificate of self-compliance with Section 627 in order to qualify for a share of excess funds for fiscal year 1981, the first year for which the Act was applicable. Pet. App. 8a, 24a.

> months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be placed for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis) * * *.

In introducing the Senate version of the bill (125 Cong. Rec. 22685 (1979)), Senator Cranston made clear why these "dispositional hearings" were essential:

> One of the prime weaknesses of our existing foster-care system is that, once a child enters the system and remains in it for even a few months, the child is likely to become "lost" in the system. Yearly judicial reviews of the child's placement too often become perfunctory exercises with little or no focus upon the difficult question of what the child's future placement should be. * * * This provision requiring a dispositional hearing after a child has been in foster care for a specific period of time should assist States in making the difficult, but critical, decisions regarding a foster child's long-term placement.

See also *Lynch* v. *King*, 550 F. Supp. 325, 335 (D. Mass. 1982) ("Periodic review * * * is designed to ensure that the plan for the foster child is adapted to changing circumstances. It is designed to ensure that, in light of current conditions, the child's placement in foster care continues to be necessary and appropriate to his or her needs.").

2. On July 29, 1981, petitioner certified that it was in compliance with the Act and that it was eligible for excess funds. The Acting Commissioner of the Administration for Children, Youth and Families (ACYF), a subdivision of HHS, initially accepted that self-certification. Petitioner accordingly received $346,872 in excess funds for fiscal year 1981. Pet. App. 8a.

In April 1982, all states, including Vermont, were informed that their self-certifications would be subject to verification by the ACYF to assure compliance with the Act. As a result of that review, the ACYF determined that petitioner was not in compliance. In relevant part, the ACYF found that petitioner did not guarantee periodic dispositional hearings—mandated by Section 675(5)(C)—for children whose parents had had their parental rights terminated (so-called "TPR children"). Pet. App. 9a.[2]

Petitioner appealed the ACYF's decision to the HHS Department Grant Appeals Board. The Board affirmed the agency's decision, holding that petitioner was ineligible for excess funds for fiscal year 1981 (Pet. App. 33a-45a). The Board determined that petitioner's foster-care procedures did not satisfy the requirements of 42 U.S.C. 675(5)(C), which mandate periodic dispositional hearings for all children in foster care, including TPR children (Pet. App. 36a-41a). Concluding that petitioner's procedures fell short of the federal mandate in that respect, the Board did not address the other two grounds relied on by the ACYF in finding petitioner ineligible for excess funds (Pet. App. 41a).[3]

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[2] The ACYF also noted two related deficiences in petitioner's procedures: first, that petitioner did not require that a dispositional hearing be held within 18 months of the original placement of each child in foster care; and second, that petitioner did not require a dispositional hearing in the event that no party requested a hearing. Pet. App. 36a.

[3] The Board also rejected (Pet. App. 41a-44a) petitioner's claim that the ACYF had discriminated against the State by finding 18 other

3. Petitioner filed this action in the United States District Court for the District of Vermont seeking to set aside the Board's decision. The district court reversed (Pet. App. 20a-32a). It held, first, that a Vermont foster care statute, Vt. Stat. Ann. tit. 33, § 658 (b) (Supp. 1985), satisfied the procedural requirements of federal law, even though prior to 1982 the Vermont statute provided for dispositional hearings only biennially, rather than within 18 months of the child's original placement in foster care, as the federal statute requires (Pet. App. 29a). The district court appeared to acknowledge that the Vermont statute did not require dispositional hearings for TPR children after the termination of parental rights, but the court held that this was not a violation of the Act. According to the district court, in Vermont the termination of parental rights is itself a dispositional hearing; the court reasoned that "[i]t comports with neither the federal statute nor common sense to require an additional initial dispositional hearing" (Pet. App. 30a-31a). Without reaching petitioner's "estoppel and equity" claims (*id.* at 30a), the court concluded that "HHS possesse[s] no expertise with regard to Vermont law" and held that it must "strip away the veneer of agency expertise that normally adheres to federal agency action" (*id.* at 29a).[4]

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states eligible for funds even though they purportedly had also failed to provide the required dispositional hearings. The Board held that "[e]ven assuming that the State was treated differently from other states," that fact could not excuse petitioner's "clear violation of a statutory requirement" (*id.* at 42a). The Board likewise rejected (*id.* at 44a) petitioner's contention that the government was estopped from recouping the excess funds from petitioner. It noted that petitioner had failed to "elaborat[e] * * * the basis for this argument" (*ibid.*).

[4] The court also rejected as "arbitrary, capricious and wrong" the other two deficiencies identified by ACYF in the State's foster-care procedures (Pet. App. 30a).

The court of appeals unanimously reversed (Pet. App. 3a-17a). It held, first, that the district court's reliance on Vt. Stat. Ann. tit. 33, § 658(b) (Supp. 1985) was error because "the Vermont statute simply does not apply to TPR children, and therefore falls short of the federal mandate that *every* child in foster care receive a periodic dispositional hearing" (Pet. App. 11a (emphasis in original)). The court noted that petitioner itself had conceded in the district court that the hearings provided by the Vermont statute were purely discretionary for TPR children, whereas the federal statute "is clear in extending to '*each* child in foster care under the supervision of the State' the protection of periodic dispositional hearings" (Pet. App. 13a, quoting 42 U.S.C. 675(5)(C) (emphasis in original)). The court also rejected the district court's assumption that the hearing accompanying the termination of parental rights was itself a sufficient "dispositional hearing" for purposes of the federal statute. The court observed that the district court's assumption "misperceives the very purpose of the Act, *viz.*, to assure all children periodic hearings until a *final* disposition is effected. Since the mere termination of parental rights does not serve to remove a child from the foster care system, [the district court] erred in concluding that TPR children required no further dispositional hearings." Pet. App. 14a-15a. Finally, the court rejected petitioner's contentions that its state adoption procedures, six-month case reviews, and discretionary hearings for TPR children satisfied the "dispositional hearings" requirement of the Act.[5] The court reversed the judgment of the district court and remanded

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[5] The court noted (Pet. App. 15a) that Vermont's adoption procedures do not furnish any hearing unless and until adoption proceedings have actually commenced. "Clearly, TPR children who are not fortunate enough to be considered for adoption never will receive such a hearing." The court also held that Vermont's six-month case reviews are not "dispositional hearings" within the meaning of the federal law, since they are nonjudicial proceedings that lack procedural protec-

with instructions to enter an order affirming the Board's decision (Pet. App. 17a).[6]

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. Petitioner does not seriously dispute the central determination of the court of appeals: that in 1981 petitioner did not provide for TPR children the "dispositional hearings" that are required by federal law as a condition to the receipt of excess funds. The Act by its terms requires dispositional hearings—for all children—throughout the period of their stay in foster care under the state's supervision. The language of 42 U.S.C. 675(5)(C) is broadly in-

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tections for the child (*ibid.*). Finally, the court rejected the claim that the decision of a juvenile court to refrain from holding a discretionary hearing for TPR children under Vt. Stat. Ann. tit. 33, § 659 (1981) should be regarded as "tacit approval of the results of * * * administrative reviews," thus purportedly obviating the need for the formal dispositional hearings required by federal law (Pet. App. 15a-17a).

[6] The court of appeals did not explicitly address the so-called "equitable" claims to which petitioner devotes much of its petition, namely, the allegations that the government had applied an "ex post facto" legal standard in denying excess funds to Vermont (Pet. 6, 8); that the government had discriminated against Vermont in relation to its treatment of similarly situated states (*id.* at 9-10); and that the government should be estopped from seeking to recoup the funds (*id.* at 10). In its opening brief in the court of appeals, petitioner did not address the merits of any of these issues, referring to them in a single paragraph that asked the court of appeals to remand the issues for further consideration by the district court. Petitioner offered no reasons why it believed its arguments to be meritorious and thus that a remand was appropriate. See C.A. Br. 26-27. The court of appeals thereafter requested supplemental briefing on the estoppel issue; only then did petitioner advance any purported basis for that claim. At no time did petitioner address in the court of appeals the merits of its "ex post facto" and "discrimination" claims.

clusive, requiring "with respect to each [foster] child" a "dispositional hearing to be held * * * no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care)." There is no exception for TPR children, and a court is not free to find an exception where none is prescribed. Cf. *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980); *TVA* v. *Hill*, 437 U.S. 153, 188 (1978); *Aaron* v. *SEC*, 446 U.S. 680 (1980); *Atwell* v. *MSPB*, 670 F.2d 272, 286 (D.C. Cir. 1981). Contrary to the district court's statement (Pet. App. 31a), moreover, an exception for TPR children is not supported by "common sense." Notwithstanding a termination of parental rights, the foster child remains in a temporary foster-care situation, and Congress's objective in requiring dispositional hearings was to remove the child from that status *either* by reuniting him with his parents *or* by placing him with adoptive parents or in some other permanent arrangement. See Pet. App. 13a.[7]

Rather than assert that TPR children are not covered by the Act (a claim that it advanced without success in the court of appeals (Pet. App. 14a)), petitioner contends (Pet. 11) that Vermont's procedures with respect to TPR children satisfy the federal requirements. But as petitioner itself conceded in the district court (*ibid.*), the hearings provided by Vt. Stat. Ann. tit. 33, § 658 (Supp. 1985) are discretionary, not mandatory, for TPR children. And the other Vermont procedures offer at best "an opportunity" (*ibid.*) for additional hearings and thus fail to provide

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[7] As the court of appeals pointed out (Pet. App. 14a), a 1984 study prepared by the American Bar Association emphasized that "[c]hildren who are still in foster care following termination of parental rights" are "entitled to a dispositional hearing under the explicit language of the act," since, until they are "actually placed for adoption or guardianship, they are still in state supervised foster care." 3 ABA, *Comparative Study of State Case Review System Phase II: Dispositional Hearings* 2-45 (1984).

TPR children with the procedural protections envisioned by the federal statute. The Act by its terms requires *mandatory* dispositional hearings, stating plainly that "procedural safeguards *will be applied* * * * to assure each child in foster care under the supervision of the State of a dispositional hearing * * *." 42 U.S.C. 675(5)(C) (emphasis added).

Finally, petitioner asserts that the federal statute is "ambiguous" (Pet. 5, 10, 11), a conclusion that it appears to draw from the fact that the court of appeals and the district court reached contrary results.[8] We do not find the words "each child" (42 U.S.C. 675(5)(C)) to be ambiguous, and the fact that the district court misconstrued the statute calls for no different conclusion. Cf. *United States* v. *Turkette*, 452 U.S. 576, 580-581 (1981) (rejecting the court of appeals' restricted reading of the RICO statute as unwarranted by the plain terms of the act). And even if the statute were thought to be ambiguous, it is hard to see how that would help petitioner. It is well established that, where two interpretations of a statute are equally reasonable, the agency's interpretation should be deferred to. See *United States* v. *Locke*, 471 U.S. 84, 102 n.14 (1985); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981).

2. Petitioner also contends (Pet. 5-10) that the court of appeals "depart[ed] from the accepted and usual course of judicial proceedings" (*id.* at 5) by rejecting its so-called "equitable" arguments sub silentio instead of remanding them to the district court. The arguments to which petitioner refers are its contentions that HHS violated due process by applying a new legal standard retroactively (*id.* at 8-9); that HHS discriminated against petitioner rela-

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[8] Petitioner also asserts that HHS "used multiple interpretations of § 675(5)(C) in reviewing the various state eligibility applications for fiscal year 1981" (Pet. 11-12), but petitioner offers no support for this contention and neither court below alluded to it.

tive to "similarly situated parties" (*id.* at 9-10); and that HHS was estopped to recoup the excess funds distributed to petitioner in 1981 (*id.* at 10). As we have noted (page 7 note 6, *supra*), petitioner failed to devote any substantive discussion to these contentions in its opening brief to the court of appeals, and petitioner discussed only the last contention in a supplemental brief filed at the court of appeals' direction. Petitioner's own briefing strategy thus suggested that the arguments were makeweights, and the court of appeals correctly rejected them without further ado.

While a reviewing court ordinarily will remand issues that were presented to, but not passed on by, the trial court, this principle is not "inflexible" (*Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941)). A court of appeals "has broad power to make any disposition that is 'just under the circumstances' " (*Central Hudson Gas & Electric Corp.* v. *EPA*, 587 F.2d 549, 557 (2d Cir. 1978) (quoting 28 U.S.C. 2106)). Particularly where "[t]he only issue involved * * * is one of law [and] there are no genuine issues of material fact," a reviewing court may resolve questions not decided by the lower court (*Central Hudson Gas*, 587 F.2d at 557-558). Here, the court of appeals correctly chose not to remand for a formal disposition of petitioner's "equitable" arguments since those arguments are plainly meritless.

First, petitioner mischaracterizes as "ex post facto" (Pet. 6) the agency's finding that Vermont was ineligible to receive excess funds in 1981. After preliminarily accepting petitioner's certification that it had complied with the Act, the ACYF undertook its own review of the State's foster-care procedures. That review disclosed that petitioner was, in fact, not providing mandatory dispositional hearings for TPR children, as required by federal law. In reaching that determination, the agency in no sense "retroactively applie[d] a revised standard" (Pet. 8). To the contrary, the "standard" applied by the agency was the standard that

Congress embodied directly in the statute: that, in order to qualify for excess funds, each state must provide "each child" with a "dispositional hearing * * * no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care)" (42 U.S.C. 675(5)(C)). The fact that HHS did not audit petitioner's self-certification until after the 1981 funds had been distributed does not mean that HHS engaged in "ex post facto" decisionmaking.[9]

Second, petitioner offers no support whatever for its assertion that HHS discriminated against Vermont in allocating excess funds for 1981. And even if petitioner had introduced some evidence on that question below, which it did not do, there would be no legal difference. An agency is not free to ignore conceded deficiencies in a state's compliance with federal law simply because other states may have failed in the same or similar ways.

Finally, petitioner's estoppel claim is frivolous. "[I]t is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler* v. *Community Health Services*, 467 U.S. 51, 60 (1984) (footnote omitted). While this Court has left open the question

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[9] Petitioner's reliance on this Court's decisions in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), and 332 U.S. 194 (1947), is thus entirely misplaced. Those cases stand for the proposition that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based" (318 U.S. at 87). This case obviously does not present that issue. In initially accepting petitioner's self-certification, the ACYF did not purport to adopt any particular standard from which it later retreated; the agency simply took petitioner at its word, and then discovered in a subsequent audit that petitioner was not in fact in compliance with the foster-care procedures mandated by federal law. To take an analogous example from the tax law, the IRS often audits tax returns that request refunds, even though the requested refunds are typically paid when the returns are initially processed; if the audit reveals a deficiency, the taxpayer must pay the money back.

whether estoppel may ever be raised as a defense in a government enforcement action (see *Community Health Services*, 467 U.S. at 60 & n.12; *INS* v. *Miranda*, 459 U.S. 14, 19 (1982) (per curiam); *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981) (per curiam); *Montana* v. *Kennedy*, 366 U.S. 308, 315 (1961)), the Court has made clear that a claimant must, at a minimum, identify some "affirmative misconduct" (*INS* v. *Hibi*, 414 U.S. 5, 8 (1973)) or "definite misrepresentation of fact" (*Community Health Services*, 467 U.S. at 59 (citation omitted)) committed by the government. The Court has routinely rejected estoppel claims in the absence of such affirmative misconduct. See, *e.g.*, *Hibi*, 414 U.S. at 8-9. Here, petitioner can point to no affirmative misrepresentations by HHS on which the State relied. The government did not tell petitioner what foster-care procedures to adopt. HHS simply paid funds to petitioner based on its self-certification and then, when an audit revealed that petitioner was in fact out of compliance, sought to recoup the monies erroneously expended. Such government conduct cannot give rise to an estoppel. In any event, as the Court noted in rejecting a similar estoppel claim in *Community Health Services*, petitioner's position did not change for the worse as a result of the HHS audit. All petitioner suffered was "the inability to retain money that it should never have received in the first place" (467 U.S. at 61).[10]

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[10] Petitioner's reliance (Pet. 10) on this Court's decision in *United States* v. *Locke*, 471 U.S. 84 (1985), is misplaced. There, the plaintiffs challenged a federal statute regulating unpatented mining claims. One of their contentions was that a government pamphlet had affirmatively misled them as to the date by which they had to file certain claims required by the statute. This Court remanded to the district court "[w]ithout expressing any view as to whether, as a matter of law, [the claimants] could prevail on [this estoppel] theory" (471 U.S. at 89-90 n.7). The present case involves no affirmatively misleading conduct by the government. This Court's decisions in *Walters* v. *Home Savings & Loan Ass'n*, 467 U.S. 1223 (1984), and *Block* v. *Payne*, 469

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1987

U.S. 807 (1984), remanding in each instance for reconsideration in light of *Community Health Services,* are inapposite for the same reason. In each of these cases, the government was alleged to have affirmatively misled a party into an adverse change of position. See *Payne* v. *Block*, 714 F.2d 1510, 1512-1513 (11th Cir. 1983); *Home Savings & Loan Ass'n* v. *Nimmo*, 695 F.2d 1251, 1254 (10th Cir. 1982). Significantly, the court of appeals' decisions in the cited cases, each of which was vacated by this Court, had *upheld* estoppel claims asserted against the government. See *Payne*, 714 F.2d at 1518; *Home Savings*, 695 F.2d at 1255.

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